(4)

No. 06-1701

IN THE

Supreme Court of the United States

SOUTHWIRE COMPANY,
Petitioner,

v.

JOHN STEPHEN JANOWICK, *ET AL.*,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals For The Sixth Circuit

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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INTRODUCTION

The Question Presented raises a conflict between the decision below and *Hughes Aircraft v. Jacobson*, 525 U.S. 432 (1999), and reveals a split among the Circuits concerning the legal principles to be used in determining the ownership of proceeds, received by the trustee of an employee benefit plan, arising from the demutualization of the issuer of group annuity or insurance contracts purchased to fund benefits under such plan. The Respondents, John Stephen Janowick, *et al.* ("Annuitants"), attempt to redefine the issue before this Court in an unsuccessful effort to harmonize the Sixth Circuit majority opinion with *Hughes Aircraft* and to manufacture common ground among the Circuits. These efforts cannot withstand scrutiny, and Southwire's petition should be granted.[1]

ARGUMENT

1. The Annuitants are former participants in the National-Southwire Aluminum Company Pension Plan ("Plan") and third-party beneficiaries under the Group Annuity Contracts purchased to satisfy the Plan's benefit obligations upon the Plan's standard termination. In *Hughes Aircraft*, this Court unanimously held that participants and beneficiaries of a defined benefit pension plan "have a nonforfeitable right only to their 'accrued benefit,'" and have no interest in the surplus assets in the trust funding the plan. 525 U.S. at 440. The Annuitants attempt to distinguish *Hughes Aircraft* and its clear holding on the ground that the Southwire Plan was terminated and no longer an ongoing pension plan under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Annuitants'

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[1] As used herein, "Southwire" shall refer to Southwire Corporation and its current and former subsidiaries and affiliates, unless the context plainly otherwise requires.

Brief in Opposition ("Opp"), at 9. The Annuitants fail to explain, however, why mere termination of the Plan confers participants and beneficiaries rights under state law to surplus funds coming into the trust that funded the Plan after termination, where no such rights existed before. The Annuitants have received their accrued benefit. *Hughes Aircraft* forecloses their having any interest in surplus trust assets.

In support of their position, the Annuitants rely heavily upon the Department of Labor's ("DOL") Advisory Opinion 2003-05A, (April 10, 2003), 2003 WL 1901900, in which the DOL opined on whether a plan sponsor was entitled under Title I of ERISA to retain the demutualization proceeds arising from a group annuity contract purchased in connection with the termination of a defined benefit plan. On this issue, the Department of Labor concluded:

> [N]o violation of Title I of ERISA would occur if [the plan sponsor] takes possession of the proceeds. The question of whether the employer or the beneficiaries of the termination annuity contract are the actual owners of the demutualization proceeds received by the employer as the named policyholder of the annuity is not within the jurisdiction of the Department of Labor under Title I of ERISA. Rather, this issue is governed by the terms of the contract and applicable state law.

Id. at 2.

The DOL merely opined that Title I of ERISA does not require that the demutualization proceeds be treated as plan assets following the plan's termination. Advisory Opinion 2003-05A. Missing from Advisory Opinion 2003-

05A, however, is any language supporting the Annuitants' argument that the beneficiaries should be the actual owners of the demutualization proceeds arising after a plan's termination.

Notably, the group annuity contract at issue in Advisory Opinion 2003-05A named the employer, not the trustee, as the policyholder. Therefore, upon the 2001 demutualization at issue before the DOL, the proceeds would not have gone necessarily into the underlying plan trust under the terms of the group annuity contracts. In contrast, the terms of the two Group Annuity Contracts at issue here designated the contract-holder as "Irving Trust Company, as Trustee" for the Plan. It is because BNY received the demutualization proceeds as the successor-in-interest to the "Trustee," that trust law principles and the terms of the underlying trust documents should be used to determine BNY's rights and responsibilities regarding the distribution of those proceeds.

This Court has repeatedly held that traditional principles of trust law give a trustee only those duties and powers conferred by the trust documents and those powers necessary or appropriate for carrying out the purposes of the trust. *See Varity Corp. v. Howe*, 516 U.S. 498 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); and *Central States, South East & South West Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559 (1985). Therefore, the underlying trust documents and traditional principles of trust law should be used to determine a trustee's rights and responsibilities concerning the distribution of any funds coming into its hands – regardless of whether the plan for which the trust was created is ongoing or has been terminated or remains subject to ERISA. Advisory Opinion 2003-05A docs not stand for the proposition that courts can re-write group annuity contracts to give participants and beneficiaries additional benefits in excess of their "accrued

benefit." Such a conclusion is in direct conflict with a principal holding of *Hughes Aircraft*.

2. The Annuitants also rely upon this Court's recent decision in *Beck v. PACE Int'l Union*, 551 U.S. --, 127 S. Ct. 2310 (2007), to support their argument that the parties' legal rights are "transformed" upon termination of a pension plan. Opp., p. 4. An examination of *Beck*, however, actually supports Southwire's claim that it is the rightful owner of the Demutualization Proceeds in this case.

In *Beck*, this Court unanimously upheld an employer's right to a reversion of surplus funds in an over-funded, terminated defined benefit plan. 551 U.S. --, 127 S. Ct. at 2310. *Beck* involved competing claims to a $5 million reversion resulting from the standard termination of several consolidated and over-funded defined benefit pension plans. The Court was called upon to consider whether ERISA imposes a fiduciary duty on sponsors of terminating pension plans to consider merger with a multi-employer plan as a method of termination. In reaching the conclusion that merger is not a permissible form of termination under ERISA, this Court noted that a plan merger involves a continuation, rather than the cessation, of the ERISA regime. In contrast, "terminating a plan through purchase of annuities . . . formally severs the applicability of ERISA to plan assets and employer obligations," leaving participants with primarily state law remedies if proper payments under the annuity contracts are not made. *Id.* at 2319.

From this, the Annuitants argue that state contract law somehow entitles them to assets coming into the possession of Plan's trustee after termination. There is no language in *Beck*, however, which suggests this result. To the contrary, this Court expressly recognized in *Beck*, that "the common law of trusts . . . serves as ERISA's backdrop" and aids a determination of the rights and obligations of an

employer in its role as sponsor and administrator of a defined-benefit pension plan. *Id.* at 2316. *See also, e.g., Pegram v. Herdrich*, 530 U.S. 211, 224 (2000); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996). Therefore, regardless of whether ERISA statutory law continues to apply after a pension plan's termination, the common law of trusts and the plan documents should continue to govern the determination of the ownership of assets coming into the possession of a plan trustee.

Although the Annuitants rely upon *Beck* to support their position, there is nothing in this Court's holding in *Beck* which suggests that a court is permitted, as the majority opinion below did here, to ignore (i) the contract-holder's legal status as trustee, (ii) the underlying plan-trust documents and (iii) common law trust principles in determining whether the employer or plan participants are the actual owners of surplus trust assets following the plan's termination. Likewise, nothing in *Beck* suggests that courts should be permitted to re-write a group annuity contract to give pension plan participants and beneficiaries rights to surplus trust assets that they would not otherwise have. Indeed, *Beck* unanimously upheld a plan sponsor's right to surplus plan assets.

For purposes of this Court's consideration of certiorari review, the critical issue is whether, and how, trust law and contract law should be applied to promote consistency in determining the proper disposition of proceeds arising from the termination of a defined benefit pension plan.

3. The approach of the majority opinion below conflicts with *Stewart v. National Educ. Ass'n*, 471 F.3d 169 (D.C. Cir. 2006), and *RLJCS Enters., Inc. v. Professional Benefit Trust Multiple Employer Welfare Benefit Plan & Trust*, 487 F.3d 494 (7th Cir. 2007). In their attempt to

harmonize the majority opinion with these decisions, the Annuitants observe that the *Stewart* and *RLJCS* cases also involved on-going employee benefit plans, rather than a terminated plan. As demonstrated above, however, the fact that a plan has been terminated does not change the analysis of what a trustee must do with demutualization proceeds received as the contract-holder of an annuity contract or insurance contract purchased in connection with an employee benefit plan.

The Annuitants have articulated no principled reason why the approach used by the majority opinion below to construe (or re-write) the terms of the Group Annuity Contracts also could not have been used to add terms to the insurance contracts involved in *Stewart* or *RLJCS*. Prior to the legal changes in the 1990's which allowed the conversion of mutual insurance companies to stock companies, parties rarely, if ever, contemplated the prospect of demutualization (or any proceeds therefrom) when entering into insurance or annuity contracts with a mutual insurance company. If such contracts typically specified the appropriate recipient of proceeds in the event of demutualization, the parties likely would not be litigating these matters.

But these contracts and policies typically did not contain such a provision, beyond the basic provision of a policy-holder or contract-holder. Accordingly, in *Stewart* and *RLJCS*, the Circuit Courts properly held that the disposition of the demutualization proceeds turned on the terms of the governing plan document or trust instrument. Neither court attempted to add terms to the involved insurance contracts or to ignore the legal capacity of the contract-holder designated on the face of the contract.[2] In

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[2] Indeed, the case for adding "missing essential terms" to give additional rights to individual participants and beneficiaries arguably would have been stronger in *Stewart*, where the individual participants and

contrast, the majority opinion below ignored that a "trustee" was the contract-holder and re-wrote the Group Annuity Contracts to give additional benefits to the Annuitants. This approach conflicts with the Courts of Appeals' decisions in *Stewart* and *RLJCS*, thereby creating a split among circuits which this Court should now resolve

4. Policy considerations also support the conclusion that trust law principles and the plan documents should govern who owns demutualization proceeds arising in connection with a benefit plan. Employers may delay funding their plans for fear that they will lose surplus assets or reversion funds to which they would otherwise be entitled. Given the critical role played by employee benefit plans in our private health and retirement systems, it is potentially disastrous to have authority for the proposition that courts are permitted to re-write insurance or annuity contracts to give participants benefits that exceeded those intended by employers and set forth in plan documents.

This Court recognized similar policy considerations in *Beck* in determining that merger is not a permissible form of plan termination under ERISA, noting:

> For employers, the ill effects are demonstrated by the facts of this very case: by diligently funding its pension plans, Crown became the bait for a union bent on obtaining a surplus that was rightfully Crown's. All this after Crown purchased an annuity that none dispute was sufficient to satisfy its commitments to plan participants and beneficiaries.

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beneficiaries actually paid the premiums under the insurance contracts, than here, where the funds used to pay the premiums for the Group Annuity Contracts here came exclusively from Southwire.

Beck, 127 U.S. at 2321.

The situation here is not materially different from that in *Beck* – only the methodology utilized. Southwire fully funded the Plan. The Group Annuity Contracts undisputedly satisfied all accrued benefits owed to the Plan's participants and beneficiaries. Accordingly, trust principles and the underlying trust documents should be used to determine the owner of any assets coming into the hands of a plan trustee after the plan's termination.

5. The Annuitants' contention that the Question Presented does not raise a sufficient issue of federal interest is overly narrow and myopic. The Question Presented arises directly from annuity contracts purchased pursuant to provisions of ERISA applicable to the standard termination of defined benefit pension plans. The proper disposition of funds arising from the termination of an ERISA benefit plan presents an important issue in connection with the overall federal interest and oversight of such pension plans. Accordingly, it is appropriate for this Court to determine the proper legal principles to be used by other courts in deciding this issue.

6. Finally, Southwire is perplexed by the "Brief in Opposition" filed by Century Aluminum Company ("Century"). First, the Argument section of Century's Brief contradicts the title by stating that Century in fact "takes no position on whether the Court should grant the Petition." Century's Brief in Opposition, p. 5). Second, Century's Brief simply re-hashes contentions that were rejected by the district court and dismissed by the Sixth Circuit as being moot.

Century's Brief in Opposition attempts to restate the merits of Century's position in the underlying dispute, which is not appropriate at this stage and provides no assistance on

the issue of whether this Court should grant certiorari review. Because Century's Brief contains no arguments or information relating to the issues before the Court, Southwire will not respond to Century's assertions except to reiterate, for purposes of the record, that Southwire disputes those contentions.

In summary, the legal analysis applied to the Question Presented by the majority opinion below conflicts with this Court's decision in *Hughes Aircraft* and varies from Circuit to Circuit. In face of the conflicting claims continuing to surface as a result of the recent wave of demutualizations, as evidenced by *Stewart, RLJCS* and this case, and with more and more plan sponsors freezing and terminating defined benefit pension plans,[3] this Court should grant Southwire's Petition to clarify the correct legal principles to be used in determining the rightful owner of demutualization proceeds received by the trustee or administrator of an employee benefit plan (terminated or otherwise). This Court's guidance is needed to prevent lower courts from re-writing insurance contracts or annuity contracts to give participants and beneficiaries additional benefits to which they are not otherwise entitled under federal law or ordinary principles of trust law.

CONCLUSION

For the foregoing reasons, and those in the petition, Southwire's petition for a writ of certiorari should be granted.

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[3] ERRI Notes "The Employment-Based Pension System: Evolution or Revolution?" July 2006, Vol. 27, No. 7.

Respectfully submitted,

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